(2)

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

John R. Wyss, et al.,
Petitioners,

v.

City of Hoquiam, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NO: 04-35020
D.C. No. CV-02-05529-JKA

APPENDIX INCLUDED UNDER RULE 14.1(i)

John R. Wyss
Petitioner
23005 107th Pl. W.
Edmonds, WA 98020
(206) 469-0777

APPENDIX INCLUDED UNDER RULE 14.1(i)
(Applicable portions only)

EXHIBIT #

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2) Case No: 04-35020, Ninth Circuit Court of Appeals- (Memorandum and Judgment)..... page 24

3) Hoquiam's City Code Chapter 2.22, Dangerous Buildings, section 2.22.010..... page 29

4) 1997 Uniform Code for the Abatement of Dangerous Buildings. §403.1, §404, §501.1 and §504..... page 30

5) Revised Code of Washington, RCW 36.70C.030..... page 37

6) McQuillin's The Law Of Municipal Corporations (3rd Ed)- §24.560.-"Vacation" .....page 38

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

CASE NO. C02-5529JKA
JOHNR.WYSS, Plaintiffs,
v.
CITY OF HOQUIAM, et aL, Defendants.

ORDER GRANTING DEFENDANTS' SUMMARY JUDGMENT
This case has been reassigned to the undersigned magistrate judge for the conduct of all proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) on the consent of the parties: The matter is before the court on plaintiffs motion for partial summary judgment (Doc~ 35),defendant City of Hoquiam's cross- motion for summary judgment (Doc. 38), and defendant Grays Harbor PUD's cross-motion for summary judgment (Doc. 51). The Court, after reviewing the pending motions, responses thereto, and the remaining record, does hereby find and ORDER:

1. Plaintiff, John R. Wyss, seeks partial summary judgment, including the court's declaration that the City of Hoquiam, Susan Vasey Orlando Howell, and the Grays harbor P.U.D. each violated his U.S. Constitutional rights. Plaintiffs

complaint names each of these individuals or entities as a defendant in the matter, in addition to naming the City of Hoquiam's Public Works Department, John Hoder, and John Does 1-20 as defendants. Plaintiffs complaint alleges the following three causes of action against these various defendants:

(i) deprivation of home and property without compensation;

(ii) denial of procedural due process~ and
(iii) physical invasion and the taking of plaintiffs property.

2. Defendant City of Hoquiam's cross-motion for summary judgment seeks dismissal of plaintiff's causes of action and judgment in its favor on certain counterclaims. Specifically, the City argues it has not unconstitutionally taken plaintiffs property and the abatement action was an exercise of necessary police power, which included adequate procedural due process. The City argues John Wyss's conveyance of a portion of the property to a minor child was an unlawful subdivision of the property and the court should nullify the conveyance. The City also argues the individual defendants, Susan Vasey and Orlando Howell, are entitled to

qualified immunity.

3. Defendant Grays Harbor PUD's motion for summary judgment seeks dismissal of plaintiff's causes action based on the argument that it had proper legal authority to disconnect electrical service without notice when a building is dangerous or unoccupied.

4. Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding whether to grant summary judgment, the court must view the record in the light most favorable to the nonmoving party and must indulge all inferences favorable to that party. Fed.R.Civ.P. 56(c) and (e). When a motion for summary judgment is made and supported as provided in Fed.R.Civ.P. 56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e).

The relevant facts are undisputed. Plaintiff, John Wyss, owns a 6,720 square foot, 8-unit apartment building, at 314 Lincoln Street in the City of Hoquiam, where he and his young son lived. On July 23, 199, Susan Vasey, Orlando Howell, Jim Tobey, Ray Pumphrey

and Pat Beatty inspected the building in the presence of Mr. Wyss. Plaintiff was forced to out of the building when the City declared that building was unsafe and dangerous.

The Washington State Court of Appeals concluded the following facts:

On August 30, 1999, the City issued a notice and order of abatement declaring Wyss's building to be a "dangerous building" in violation of the Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition, which the City had incorporated into its municipal code. Hoquiam City Code sec. 2.22.0 10. The City sent the abatement order to

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Wyss at 9020 Greenwood Avenue North in Seattle, WA 98103.

The abatement order cited sections of the Uniform Code as adopted by the Hoquiam City Code that Wyss violated. The abatement order required Wyss to vacate the building within 30 days of the receipt of the order. It further ordered him to begin demolishing the building within 60 days of the order or the City would do so at Wyss's expense.

On September 29, 1999, Wyss appealed the abatement order by filing a notice of appeal with the Hoquiam Building Code Council. After some rescheduling, a hearing was set for December 1, 1999.

[FN1] The City sent a notice of this

hearing to Wyss at 9020 Greenwood Avenue North in Seattle. The notice was accepted and signed for at that address.

FNI. Originally, the hearing was set for November 10, 1999. Wyss appeared at that date, but the City's building official, Su Vasey, was unable to testify due to illness. The meeting was then rescheduled for December 1, 1999.

Wyss argues in his brief that the City violated its own rules when it held the hearing over 60 days beyond the date of the abatement order. See Uniform Code for the Abatement of Dangerous Buildings sec. 501.3, at appendix A-10 to Appellant's Brief Wyss did not raise this issue before the Council or the superior court and, thus, we do not consider this error here. RAP 2.5(a).

On December 1, 1999, the Council conducted a public hearing. It rendered a decision affirming the abatement order. Wyss appeared at the hearing, testified on his own behalf, and heard the Council's decision.

On December 8, 1999, the Council's chair signed the Council's findings of fact and determination of issues (the Council decision) regarding Wyss's building on 314 Lincoln Street. The Council's decision required Wyss either to bring the building into compliance with the Uniform Code and the Hoquiam City Code or to have the building

demolished.

On December 9, 1999, the City sent Wyss a letter containing the Council decision by certified mail to 9020 Greenwood Avenue North, Seattle, Washington, 98103. The certified mail envelope was marked 'refused' by postal employees and returned to the City. The City received the returned letter on January 14, 2000.

On February 9, 2000, Wyss sent the City a letter acknowledging receipt of the 'package of information' and requesting a permit to contract for his own demolition service.
The return address on this letter was 'John Wyss, 9020 Greenwood Ave. N., Seattle, WA 98103.' Clerk's Papers (CP) at 70.

On February 22, Wyss filed a petition for review of the administrative agency decision in Grays Harbor County Superior Court. The petition was filed under RCW 34.05.546, which sets forth the requirements for a petition for review under the
Administrative Procedures Act. Wyss noted in this document that 'messages can be left in care of attorney Marja Starczewski, at 2026 N.W. Market St., Seattle, WA 98107....' [FN2] CP at 25.

FN2. Wyss appeared pro se throughout all proceedings.

On February 28, the City filed a motion and affidavit for order of dismissal of Wyss's appeal as untimely.

The City argued that Wyss's petition was time barred.

On March 15, Wyss filed an "Amended Complaint, Verified Petition for Review

under RCW sec. 7.16.040 and Petition for Trial De Novo under RCW sec. 35.80.030(2)." [FN3} CP at 34.

FN3. RCW 7.16.040 authorizes writs of review when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law.

RCW 35.80.030(2) is the section of the Unfit Dwellings, Buildings, and Structures Act (Unfit Buildings Act) that allows a petition for an injunction and trial de novo within 30 days of the posting and service of a municipal order that is authorized under this Act. As will be discussed below, the Unfit Buildings Act is discretionary for municipalities. Thus, the City's regulations are not under authority of the Unfit Buildings Act.

In his amended complaint of March 15, Wyss declared that the Council mailed him its findings of fact and determination of

issues on January 21, 2000. He then stated that '{t}his Petition is filed within 30 days of the date of mailing of the {Council's decision.' CP at 35.

On March 20, 2000, the trial court heard argument on the City's motion to dismiss Wyss's appeal as untimely. The trial court concluded that the matter was a 'land use decision' as defined by the Land Use Petition Act (LUPA). RCW 36.70C.020(1)(c). Under LUPA, a petition for review must be filed within 21 days of the date the decision was issued, allowing three days for mail distribution. RCW 36.70C.040(4)(a). The court found that the December 9, 1999 mailing of the Council's decision was adequate service. It also found that even if the January 24, 2000 date was used as the service date (the date Wyss 15 acknowledges receiving the Council's decision), Wyss's petition was not filed within the 21-day limit. The trial court granted the City's motion to dismiss with prejudice. Wyss appeals. [FN4]

FN4. The City filed a motion on the merits to affirm. RAP 18.14. A commissioner granted the motion. Wyss filed a motion to modify the commissioners ruling, which was granted. RAP 17.7; RAP 18.14(i).

Wyss v. Cityof Hoquiam, No. 25907-9-TI, (Court of Appeals of Washington, Division 2, April 5,2002)(unpublished opinion). The State Court of Appeals further concluded that the City of Hoquiam

brought its abatement action under Hoquiam City Code sec. 2.22.0 10, and as a result, the City's decision was a "land use decision" subject to LUPA and LUPA's deadlines. Affirming the state trial court, the state court of appeals restated that LUPA required plaintiff to served all parties within 21 days of the land use decision, and the trial court's dismissal of Mr. Wyss's complaint as untimely was appropriate.

Following the State Court of Appeals' decision, on October 16, 2002, Mr. Wyss filed the instant complaint. In addition to the three causes of action alleged and noted above, the complaint states Mr.Wyss filed a petition for review with the Washington State Supreme Court. Complaint at 4, line13. The petition for review was denied on December 3, 2002. Wyss v. City of Hoquiam, 147 Wash.2d 1025

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(2002).

6. Plaintiffs motion for partial summary judgment is DENIED, and Defendants (City of Hoquiam, Susan Vasey and Orlando Howell) motion for summary judgment is GRANTED.

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, Ker v. California, 374 U.S. 23, 30 (1963), declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purpose of this Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. Procedural due process does not protect the actual deprivation of the life, liberty, or property in question, but ensures that individuals are given an adequate opportunity to challenge the government action. Carey v. Piphus, 435 U.S. 247, 259 (1978). To state a claim for a violation of procedural due process, plaintiffs must show (1) a protected property interest has been taken, and (2) procedural safeguards are inadequate. Board of Regents v. Roth 408 U.S. 564, 569-70 (1972).

Government regulation of "nuisance

properties" is at the heart of municipal police power. Freeman v. City of Dallas, 242 F.3d 642, 652 (5th Cir. 2001) (en banc), cert. denied. 534 U.S. 817 (2001). As stated in that case, "It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values. Nevertheless, a city may not arbitrarily enter abatement orders or declare the existence of nuisance with no underlying standards." Id. at 652-653. "Public interest demands that all dangerous conditions be prevented or abated." Camara, 387 U.S. at 537. Whether or not a governmental action has violated a person's Fourth Amendment due process rights in a particular case requires the court to weigh the reasonableness of the seizure, a "careful balancing of governmental and private interests." Soldal v. Cook County, Ill., 506 U.S. 56, 71(1992).

In Freeman, the Fifih Circuit concluded that no Fourth Amendment violation occurred when the City of Dallas condemned and demolished an apartment building pursuant to its municipal code and without first obtaining a judicial warrant. The case turned on the fact that the City's ordinance and

procedures required reasonable notice to

and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court of the administrative decision. The court found that the City adhered to these standards and thus, the demolition of the apartment building did not violate the Fourth Amendment. In contrast, the U.S. District Court in Texas found a Fourth Amendment violation when the City of Dallas directed the demolition of several buildings and homes, and the City had failed to make reasonable efforts to provide notice to landowners. James v. City of Dallas, 2003 WL 22342799, (N.D. Texas Aug. 28, 2003, Cause No. C98-436R). These cases are instructive.

In the matter at hand the state court of appeals summarized the undisputed facts of the parties when it reviewed the state trial court's decision to dismiss Mr. Wyss petition to review the City's administrative decision. First, Mr. Wyss received notice that the City of Hoquiam had been monitoring and investigating the 8-unit apartment complex in a letter dated August 30, 1999, which was sent to his address of record, 902 Greenwood Avenue North, Seattle. In the letter, the City unequivocally stated that the building "is in a dangerous and dilapidated state," in violation of the Uniform Code for the Abatement of Dangerous Buildings. The City listed eleven specific code violations and stated, "Because of the serious safety

and health conditions that exist, as specified in subparagraphs (1) through (11), the structure known as 314 Lincoln Street, is declared a nuisance and contrary to the law," and that it must be demolished and vacated within the next thirty (30) days. The letter also provided Mr. Wyss notice that he could appeal the order of abatement to the City's Board of Appeals within thirty (30) days.

On September 29, 1999, Mr. Wyss delivered his written appeal to the Board of Appeals. Mr. Wyss's written appeal argues the building is not used commercially and that it has been converted to and is used only as a single family dwelling.

The Appeals Board hearing was originally scheduled for November 10, 1999, but due to Ms. Vasey's illness, it was rescheduled for December 1, 1999. Mr. Wyss attended the November 10, 1999, meeting and was informed that not testimony would be heard until December 1, 1999. In addition, a letter was sent to Mr. Wyss at the Greenwood Avenue address confirming the change in hearing dates.

On December 8, 1999, the Building Code Council and the Board of Appeals issued its findings and decision. The decision reflects that the August 30, 1999, Notice and Order of Abatement directed Mr.Wyss to vacate the premise and demolition of the building. The

decision further reflects that Mr. Wyss

testified at the December 1, 1999, hearing, and argued that he had accomplished and repaired many of the problems specified by the City's Building Department and the Fire Department. The Board considered a report prepared by Jim Tobey, of the Grays Harbor Health Department, dated July 28, 1999, and the testimony of Ms Vasey regarding the current condition of the building. The Appeals Board concluded among other things that the building was likely to partially or completely collapse, if lived in the building was likely to cause sickness or disease, it was a fire hazard, and its condition constituted a public nuisance.

The Board concluded by stating:

> The entire premises, both inside and outside the building, shall be cleaned-up and all garbage, refuse and debris removed to the satisfaction of the City Building Official. The building will then be demolished as set forth in the Notice and Order of August 30, 1999, unless the Appellant decides that he still wants to repair and rehabilitate the building, in which case he shall comply with the requirements set forth in Paragraph III, below.

III. Should the Appellant decide to repair and rehabilitate the building, he shall submit a satisfactory working plan or building plan to the City of Hoquiam Building Department and apply for a building permit, by not later than January 3, 2000. The Appellant shall then complete all necessary repairs to bring the building into compliance with the Uniform Building Code and the Uniform Code for the Abatement of Dangerous Buildings, on a schedule to be approved by the City of Hoquiam Building Department.

IV. In the event that the Appellant does not decide to repair and rehabilitate the building, or does not comply with the above requirements, he shall obtain a demolition permit and commence demolition of the building by no later than January 3, 2000. Should he fail to do so, the City of Hoquiam shall be authorized to take action to demolish the building in accordance with the Uniform Code for the Abatement of Dangerous Buildings.

The Washington State Court of Appeals found that Mr. Wyss was served with a copy of the Board's decision on December 12, 1999, when the City sent the decision by certified mail on December 9 to Mr. Wyss' Greenwood Avenue address. As explained by the State Court of Appeals, Mr. Wyss untimely filed a petition for judicial review of the Boards' decision on February 22, 2000.

This court is unwilling to disrupt the state court findings. As argued by defendants in their motion, Mr. Wyss is collaterally estopped from re-litigating the fact that the City sent a copy of the Board's decision to the appropriate address on December 9, 1999, and this was found sufficient. Moreover, the court questions whether it has any authority to consider Mr. Wyss's contention that he was not served with notice of the Board's decision until January 25, 2000 under the Rooker-Feldman Doctrine. As a general matter, lower federal courts do not have authority to review final determinations of state courts. Rather, the only federal forum in which such review can be sought is the United States Supreme Court. See Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir.1986) (citing 28 U.S.C. § 1257). The

Rooker-Feidman doctrine is merely a development of those principles: A federal district court does not 2 have jurisdiction to hear a case that would require the court to review a state court judgment, even if the case presents federal constitutional issues, and even if the state court judgment is not from the state's highest court. See Dubinka v. Judges of the Superior Court, 23 F.3d 218, 221 (9th Cir.1994); WorldwideChurch

of God, 805 F.2d at 890, 893 (applying the doctrine to a case in which the appeal of the relevant state trial court judgment was still pending); see generally Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). The doctrine encompasses cases in which the issues presented to the federal court are not identical to but are "inextricably intertwined" with determinations made by the state court. See Feldman, 460 U.S. at 483-84 n. 16, 103 S.Ct. 1303; Dubinka, 11 23 F.3d at 221-22. It also applies to prohibit federal judicial review of state court review of determinations made by state administrative bodies. Feldman, 460 U.S. at 468, 485-86, 103 S.Ct. 1303 (applying the doctrine to a decision of the District of Columbia Court of Appeals, upholding a decision of the Committee on Admissions of the District of Columbia Bar). Rooker-Feidman is jurisdictional. See Olson Farms, Inc.v. Barbosa, 134 F.3d 933, 937 (9th Cir.1998).

Nonetheless, after reviewing the governmental actions and the undisputed facts presented, the court finds that Mr. Wyss was afforded due process and the governmental actions taken were reasonable. Mr. Wyss makes a strong point that the initial Order of Abatement directed demolition of his home without

providing any alternative remedies, however, it is abundantly clear that Mr. Wyss was given the opportunity to appeal that Order, and as a result, Mr. Wyss was given the opportunity to make repairs to rehabilitate the building. It is also clear that Mr. Wyss was given the opportunity to petition the state court for judicial review of the Board's decision. It is problematic that Mr. Wyss did not file his state petition in a timely manner, but it does not defeat the fact that the opportunity was provided. In sum, plaintiff's Fourth Amendment due process rights have not been violated. No material question of fact exists relevant to this decision, and Defendants' motion for summary judgment is GRANTED.

With regard to plaintiff's Fifth Amendment cause of action based on the allegation that the City of Hoquiam defendants have seized and taken his property without just compensation, the court finds no merit in this claim.

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The Fifth Amendment declares that "private property [shall not] be taken for public use, without 2 just compensation." U.S. Const. Amend. V; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S.155, 160 (1980). That prohibition applies to the States through the Fourteenth Amendment. Id. Here, as a matter of police power to protect and

ensure public safety, Mr. Wyss' building was declared a nuisance. The City did not take or seize the property for its own use. As described by the U.S. Supreme Court, when a landowner is prohibited from maintaining a nuisance he or she is not necessarily prohibited from making any lawful use of the property, and the Fifth Amendment is not a basis for a complaint. Mugler v. Kansas, 123 U.S. 623, 668-669 (1887). In this case, Mr. Wyss was not prohibited from using his building or the property on which is was located for any lawful purpose. Moreover, even if a cognizable taking had occurred in this case, Mr. Wyss has not pursued available and adequate post-deprivation remedies., and thus, he cannot maintain an action based on a "taking without just compensation." For instance, the unauthorized intentional deprivation of property by a state employee does not constitute a violation of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available under state law. Hudson v. Palmer, 468 U.S. 517 (1984).

The State of Washington provides a meaningful post-deprivation remedy for the intentional or negligent loss of property by state agents and employees. Jeffries v. Reed, 631 F. Supp. 1212, 1216 (E.D. Wash.1986). Here, Mr. Wyss has had the opportunity to challenge the City of Hoquiam's alleged taking in a reverse condemnation suit brought in state

courts. In sum, the court must GRANT defendants' motion to dismiss plaintiffs claims based on an alleged taking of property without just compensation.

7. Defendant Grays Harbor PUD's motion for summary judgment is GRANTED. Again, the relevant facts are uncontested. On or about October 22, 1999, PUD received a letter from the City of Hoquiam's Department of Public Works. The letter was written by Susan Vasey and states the following:

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> Please by [sic] advised that the structure located at 314 Lincoln Avenue has been declared a nuisance and dangerous. Per the letter dated August 30. 1999, (enclosed), the City of Hoquiam has proceeded with the abatement of the structure. The building has been posted "DO NOT ENTER - UNSAFE TO OCCUPY".
>
> Because of the serious nature of the violations, we are respectfully requesting the P.U.D. remove the electrical power to the building.

As discussed in detail above, the August 30, 1999 letter (Notice and Order of Abatement) referred to was written by Ms. Vasey to John Wyss, which states the City "concluded and declare that the current condition of the eight-unit apartment building is in

a dangerous and dilapidated state, " and in violation Uniform Code for the Abatement of Dangerous Buildings.

Plaintiff argues he was entitled to notice from P .U .D. prior to having the electrical service to his apartment building disconnected. Plaintiff argues that P.U.D. actions without notice or procedural safeguards violated his federal statutory or constitutional rights. This court disagrees.

As discussed above, the City was exercising its police power. The P.U.D. reasonably relied on the City of Hoquiam's letter and Notice and Order of Abatement. Knowing that the premises were vacant and knowing that the City had declared the building unsafe and a fire risk, the P.U.D. did not violate plaintiff's due process rights when it disconnected the electrical power to the building.

8. Lastly, defendants ask the court to determine the legality of the transfer of property from Mr. Wyss to his minor son. Defendants specifically ask the court to declare the transfer void, to declare the transfer fraudulent, and to impose a fine on plaintiff pursuant to Hoquiam Municipal Code HMC 9.36.0 10.

As a matter of state property law, this court construes plaintiffs claims as a request for this court exercise supplemental jurisdiction. However, when the cause(s) of action on which federal jurisdiction is based are dismissed from

the case, it is within a district court's discretion to retain jurisdiction to adjudicate the pendent state claims. Harrell v. 20th Century Ins. Co., 934 F.2d 203, 205 (9th Cir.1991).
Further, it is generally preferable for a district court to remand remaining pendent claims to state court. Id.

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at205.

As discussed above, plaintiffs federal claims have been dismissed. Accordingly, this court declines to exercise supplemental jurisdiction over those remaining state law matters raised by defendants.

9. Accordingly, plaintiffs motion for partial summary judgment is DENIED, and defendants' motions for summary judgment are GRANTED. Plaintiff's claims and causes of action are dismissed and the clerk is directed to enter judgment in favor of defendants.

DATED this Friday, November 21, 2003.
(signed)
J. Kelley Arnold
United States Magistrate Judge
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Exhibit 2

FILED
NOT FOR PUBLICATION JUL 21, 2004
CATHY CATTERSON, CLERK
UNITED STATES COURT OF APPEALS
U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT No. 04-35020 D.C. No, CV-02-05529-JKA
MEMORANDUM
JOHN R. WYSS, individually and as guardian Ad Litem of James Russell Beamer Wyss, Plaintiff - Appellant,
And JAMES RUSSELL BEAMER WYSS, a minor, Plaintiff,
V.
CITY OF HOQUIAM. a municipal corporation; et al..
Defendants - Appellees.

Appeal from the United States District Court for the Western District of Washington
J. Kelley Arnold, Magistrate, Presiding

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Submitted July 12, 2004

Before: HAWKINS, THOMAS, and BYBEE, Circuit Judges.

John R. Wyss appeals pro se the district

court's decision denying his motion for summary judgment and granting Defendants-Appellees' ("the City") motion for summary judgment in this 42 U.S.C. § 1983 action. Wyss contends that the district court erred in determining that the City did not "depriv[e] [him] of home and property without compensation," provided adequate procedural due process, and did not effect an unconstitutional "physical invasion and total taking of [his] property for public benefit without compensation." We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's order granting summary judgment. viewing the facts in the light most favorable to the nonmoving party. Olsen v. Idaho State Bd. of Med., 363 R3d 916. 922 (9th Cir, 2004). We affirm.

Wyss asserts that he is entitled to compensation for damages resulting from the order to vacate and the severance of electrical service because he was deprived of property without due process. He contends that he was entitled to a hearing before being ordered to vacate his home because there was no emergency present.

This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Multiple expert declarations in the

record clearly demonstrate Wyss's home was a nuisance likely to seriously injure occupants or visitors. His own conclusory declaration fails to raise a genuine issue of material fact in this regard.

The City exercised its police power in ordering Wyss's home vacated and the electricity disconnected. When immediate action is necessary to protect the public interest, such as when an unsafe nuisance is present, a hearing is not necessary prior to the exercise of police power as long as adequate post-deprivation procedural safeguards exist. Soranno 's Gasco, Inc. v. Morgan, 874 F.2d 1310. 1318 (9th Cir. 1989). There were adequate post-deprivation safeguards here because Wyss was provided a hearing before the Hoquiam Building Code Council. as well as the opportunity to appeal the Council's decision within twenty-one days. Wyss participated in the hearing, but failed to appeal within twenty-one days. The district court properly determined that the City did not violate Wyss's constitutional right not to be deprived of property without due process.

Wyss also contends that the City effected a Fourth Amendment seizure or a Fifth Amendment taking of his "home and property." The record does not support these contentions. As described above, to the extent that Wyss's home itself arguably was seized, it was a reasonable

exercise of the City's police power based on the unsafe condition of the building. See Conner v. City of Santa Ana, 897 F.2d 1487, 1493 (9th Cir. 1990) (holding that the seizure of nuisance vehicles was within the police power). An unconstitutional taking occurs when a property owner is deprived of all reasonable use of a property, including any use that may be less profitable or beneficial than desired. Am. Say, and Loan Ass'n v. County of Marin, 653 F.2d 364, 368 (9th Cir. 1981). A property owner is not entitled to the highest or best use of his property when it would conflict with a valid exercise of the police power. Id. Wyss's home was ordered vacated and demolished, but the use of his land was not otherwise restricted. Wyss was given the option at the council hearing to repair his home, and his land remains usable regardless of the demolition of his home.

The district court correctly determined as a matter of law that Wyss is not entitled to recover damages against the City in this § 1983 action.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04-35020 D.C. No. CV-02-05529-JKA
JUDGMENT
JOHN R. WYSS, individually and as guardian Ad Litem of James Russell Beamer Wyss,
Plaintiff - Appellant,
and
JAMES RUSSELL BEAMER WYSS, a minor,
Plaintiff,
V.
CITY OF HOQUIAM, a municipal corporation; et al.,

Defendants - Appellees.
Appeal from the United States District Court for the Western District of Washington (Tacoma).
This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Tacoma) and was duly submitted.
On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.
Filed and entered Wednesday, July 21, 2004

Exhibit 3

Hoquiam City Code Chapter 2.22

DANGEROUS BUILDINGS

Sections:

2.22.010 Uniform code adopted.
2.22.020 Penalties for violations.

2.22.010 Uniform code adopted.

The Uniform Code for the Abatement of Dangerous Buildings, 1997 Edition is incorporated by reference and adopted as the uniform code for repair, vacation, or demolition of dangerous buildings in the city. (Ord. 98-06 § 4, 1998; Ord. 94-10 § 4, 1994; Ord. 91-21 § 3,.1991; Ord. 91-4 § 3, 1991; Ord. 2927 § 1, 1980; Ord. 2797 § 1, 1977; Ord. 2706 § 3, 1975; Ord. 2558 § 1, 1971).

2.22.020 Penalties for violations.

Any person, firm, or corporation violating the provisions of this chapter shall be guilty of a misdemeanor and shall be punished by a fine of not exceeding five hundred dollars or imprisonment not exceeding six months, or by both. (Ord. 2927 § 1, 1980) (Revised 2/99)

Exhibit 4
1997 UNIFORM CODE FOR THE ABATEMENTOF **DANGEROUS BUILDINGS. TM**

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Chapter 4
NOTICES AND ORDERS OF BUILDING OFFICIAL

SECTION 401 — GENERAL

401.1 Commencement of Proceedings. When the building official has inspected or caused to be inspected any building and has found and determined that such building is a dangerous building, the building official shall commence proceedings to cause the repair, vacation or demolition of the building.

401.2 Notice and Order. The building official shall issue a notice and order directed to the record owner of the building. The notice and order shall contain:

1. The street address and a legal description sufficient for identification of the premises upon which the building is located.
2. A statement that the building official has found the building to be dangerous with a brief and concise description of the conditions found to render the building dangerous under the provisions of Section 302 of this code.
3. A statement of the action required to be taken as determined by the building official.
3.1 If the building official has determined that the building or structure must be repaired, the order shall require that all required permits be secured therefor and the work physically commenced within such time (not to exceed 60 days from the date of the order) and completed within such time as the building official shall determine is reasonable under all of the circumstances.
3.2 If the building official has determined that the building or structure must be vacated, the order shall require that the building or structure shall be vacated within a time certain from the date of the order as determined by the building official to be reasonable.
3.3 If the building official has determined that the building or structure must be demolished, the order shall require that the building be vacated

within such time as the building official shall determine is reasonable (not to exceed 60 days from the date of the order); that all required permits be secured therefor within 60 days from the date of the order; and that the demolition be completed within such time as the building official shall determine is reasonable.

4. Statements advising that if any required repair or demolition work (without vacation also being required) is not commenced within the time specified, the building official (i) will order the building vacated and posted to prevent further occupancy until the work is completed, and (ii) may proceed to cause the work to be done and charge the costs thereof against the property or its owner.

5. Statements advising (i) that any person having any record title or legal interest in the building may appeal from the notice and order or any action of the building official to the board of appeals, provided the appeal is made in writing as provided in this code and filed with the building official within 30 days from the date of service of such notice and order; and (ii) that failure to appeal will constitute a waiver of all right to an administrative hearing and determination of the matter.

401.3 Service of Notice and Order. The notice and order, and any amended or supplemental notice and order,

shall be served upon the record owner and posted on the property; and one copy thereof shall be served on each of the following if known to the building official or disclosed from official public records: the holder of any mortgage or deed of trust or other lien or encumbrance of record; the owner or holder of any lease of record; and the holder of any other estate or legal interest of record in or to the building or the land on which it is located. The failure of the building official to serve any person required herein to be served shall not invalidate any proceedings hereunder as to any other person duly served or relieve any such person from any duty or obligation imposed by the provisions of this section.

401.4 Method of Service. Service of the notice and order shall be made upon all persons entitled thereto either personally or by mailing a copy of such notice and order by certified mail, postage prepaid, return receipt requested, to each such person at their address as it appears on the last equalized assessment roll of the county or as known to the building official. If no address of any such person so appears or is known to the building official, then a copy of the notice and order shall be so mailed, addressed to such person, at the address of the building involved in the proceedings. The failure of any such person to receive such notice shall

not affect the validity of any proceedings taken under this section. Service by certified mail in the manner herein provided shall be effective on the date of mailing.

401.5 Proof of Service. Proof of service of the notice and order shall be certified to at the time of service by a written declaration under penalty of perjury executed by the persons effecting service, declaring the time, date and manner in which service was made. The declaration, together with any receipt card returned in acknowledgment of receipt by certified mail shall be affixed to the copy of the notice and order retained by the building official.

SECTION 402 – RECORDATION OF NOTICE AND ORDER

If compliance is not had with the order within the time specified therein, and no appeal has been properly and timely filed, the building official shall file in the office of the county recorder a certificate describing the property and certifying (i) that the building is a dangerous building and (ii) that the owner has been so notified. Whenever the corrections ordered shall thereafter have been completed or the building demolished so that it no longer exists as a dangerous building on the property described in the certificate, the building official shall file a new certificate with the county recorder certifying that the building has been

demolished or all required corrections have been made so that the building is no longer dangerous, whichever is appropriate.

SECTION 403 – REPAIR, VACATION AND DEMOLITION

The following standards shall be followed by the building official (and by the board of appeals if an appeal is taken) in ordering the repair, vacation or demolition of any dangerous building or structure:

1. Any building declared a dangerous building under this code shall be made to comply with one of the following:

1.1 The building shall be repaired in accordance with the current building code or other current code applicable to the type of substandard conditions requiring repair; or

1.2 The building shall be demolished at the option of the building owner; or

1.3 If the building does not constitute an immediate danger to the life, limb, property or safety of the public it may be vacated, secured and maintained against entry.

2. If the building or structure is in such condition as to make it immediately dangerous to the life, limb, propurty or safety of the public or its occupants, it shall be ordered to be vacated.

SECTION 404 – NOTICE TO VACATE

404.1 Posting. Every notice to vacate shall, in addition to being served

as provided in Section 401.3, be posted at or upon each exit of the building and shall be in substantially the following form:

DO NOT ENTER-UNSAFE TO OCCUPY

It is a misdemeanor to occupy this building, or to remove or deface this notice.

Building Official

of

404.2 Compliance. Whenever such notice is posted, the building official shall include a notification thereof in the notice and order issued under Section 401.2, reciting the emergency and specifying thã conditions which necessitate the posting. No person shall remain in or enter any building which has been so posted, except that entry may be made to repair, demolish or remove such building under permit. No person shall remove or deface any such notice after it is posted until the required repairs, demolition or removal have been completed and a certificate of occupancy issued pursuant to the provisions of the Building Code.

Exhibit 5

Rev. Code Wash. § 36.70C.030 (2002)

§ 36.70C.030. Chapter exclusive means of judicial review of land use decisions -- Exceptions

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

Exhibit 6

THE LAW OF
MUNICIPAL
CORPORATIONS
THIRD EDITION
EUGENE McQUILLIN
1998 REVISED VOLUME
By the Publisher's Editorial Staff
VOLUME 7A
Cite as: McQuillin Mun Corp § — (3rd Ed)
WEST GROUP
Bancroft.Whitney . Clark Boardman
Callaghan Lawyers Cooperative Publishing
WESTLAW-West Publishing
Customer Service: 1.800-328-4880
FAX: 1-800.340-9378

MUNICIPAL CORPORATIONS
§ 24.560. — Vacation.

A municipal corporation may have power in an appropriate mode to compel the vacation or closing of an unsafe building.1 But it has been ruled that while a city has authority to close up buildings that are a public nuisance, notice and a hearing2 and an opportunity to correct the defect[3] must be afforded the owner. Thus, a municipality cannot by ordinance declare a particular building a public nuisance, eject the occupants summarily and take charge of the building and its contents.[4] However, in an emergency situation, there may be no

right to due process prior to the taking of summary action.[5]

1 Connecticut. Gorra Realty, Inc. v. Jetmore, 200 Conn 151, 510 A2d 440.
Kentucky. Corbin v. Hays, 244 Ky 33, 50 SW2d 31.
New York. Henderson v. Gillroy, 203 Misc 465, 115 NYS2d 674.
Washington. Coffin v. Blackwell, 116 Wash 281, 199 P 239.
[2] New York. Thornton v. Chase, 175 Misc 748, 23 NYS2d 735.
[3]North Dakota. City of Minot v. Freelander, 426 NW2d 556 (ND 1988).
Texas. Roper v. Winner, 244 SW2d355 (Tex Civ App).
[4]Kentucky. Corbin v. Hays, 244 Ky33, 50 SW2d 31.
5 Connecticut. Gorra Realty, Inc. v. Jetmore, 200 Conn 151, 510 A2d 440.